BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RYAN RAIGOZA	)	
Claimant	)	
V.	)	
	)	
WIENS & COMPANY CONSTRUCTION, INC.	)	
Respondent	)	Docket No. 1,071,772
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the May 24, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 25, 2015, preliminary hearing and exhibits thereto; the transcript of the May 6, 2015, deposition of Marvin McGrane and exhibit thereto; the transcript of the May 6, 2015, deposition of Doug Anderson and exhibits thereto; the transcript of the December 17, 2014, deposition of claimant; and all pleadings contained in the administrative file.

ISSUES

The ALJ determined claimant suffered an injury by repetitive trauma on October 16, 2014, arising out of and in the course of employment, but failed to give timely notice.

Claimant appeals and argues:

1. He gave notice by texting his supervisor on October 17.

2. He gave notice when he provided respondent with a copy of his work restrictions.

3. His last day of work was October 24, because he was authorized to take vacation until then. Therefore, he provided timely written notice to respondent on November 3.

4. Claimant did not know his back injury was work related until he was told so by Dr. Murati on January 15, 2015, and, therefore, he could not give notice until then. In light of the foregoing, claimant asks for a waiver of the notice requirement.

Respondent requests the ALJ's findings as to date of injury and notice be affirmed. Respondent asserts the first time claimant alleged an injury date other than October 16 was on appeal to the Board. Respondent contends claimant's texts prior to October 26 did not state claimant sustained a work injury. Respondent also contends claimant did not bring a doctor's note to his supervisor within the statutory 10-day notice period.

The issues are:

1. What is the date of claimant's injury by repetitive trauma?

2. Did claimant provide timely notice of his injury by repetitive trauma?

FINDINGS OF FACT

Claimant filed his application for hearing on October 31, 2014. However, his notice of intent, also dated October 31, was not received by respondent until November 3. Claimant's notice of intent and application for hearing allege an injury by repetitive use each and every working day through October 16, 2014. At the March 25, 2015, preliminary hearing, claimant's counsel alleged the same date of injury. In claimant's submission letter to the ALJ, his counsel again alleged an injury by repetitive trauma on October 16, 2014.

Claimant began working for respondent as a laborer in November 2013. Claimant testified his back began hurting sometime prior to September 2014, when he was using a wheelbarrow and doing heavy lifting at a job in Larned. Claimant testified he told his supervisor, Marvin McGrane, that his back was hurting. He went to see Dr. David J. Starkey on September 29 and reported he had back pain for a couple of months. Claimant indicated he was told by Dr. Starkey that he probably strained some muscles. Dr. Starkey told claimant to take time off work. Claimant continued working due to financial necessity, but tried to take it easier.

According to claimant, his back condition worsened between September 29 and October 16. His back condition became severe when carrying sheets of roofing material from early October until October 16. Claimant testified he complained about his back hurting nearly every other day he roofed to coworkers and his immediate superintendent, Doug Anderson. Claimant estimated that on three occasions, he told Anderson his back hurt, but did not recall the dates. Claimant never requested medical treatment or completed an accident report.

On October 16, 2014, claimant's back got "tighter and tighter."[1] After getting off work that day, claimant went home and rested in his recliner. After resting 20 minutes, he stood up, but could not stand up all the way and had sharp pain in his lower back. The incident occurred around 5:30 p.m. Claimant then went to bed until the next morning. When claimant awoke the next day, he still had back pain. He texted Anderson and told him of hurting his back the previous day and he was going to try to see a doctor.

On October 17, claimant saw Dr. Starkey. Claimant reported to Dr. Starkey that his back had worsened due to carrying sheets of roofing material. Later that day, claimant received a text from Anderson asking what the doctor said. Claimant responded by stating the doctor thought claimant had a muscle strain, provided a muscle relaxant prescription and gave him a book on stretching.

On October 20, claimant again went to see Dr. Starkey. The doctor scheduled claimant for an MRI on October 28. Claimant texted Anderson and told him about the scheduled MRI. Claimant also texted Anderson that he was not supposed to bend, lift or do anything similar. On October 21 or 22, claimant left Dr. Starkey's written restrictions on Anderson's desk in the job trailer, but did not speak to him.

Claimant previously arranged with respondent to be off work on October 23 and 24 to attend a conference with his wife in Cincinnati and return to work on October 27. On October 27, claimant texted Anderson and told him he was coming back to town and would return to work the next day with a doctor's note. Claimant indicated Anderson texted a reply stating claimant quit and to come get his tools. Claimant texted Anderson that he had not quit, had previously arranged to go to Cincinnati and would like to discuss the situation in person.

On October 28, claimant went to respondent and spoke to Anderson in person. According to claimant, Anderson asked how his back was. Anderson told claimant his tools were in the shop and "we'll be seeing you."[2] Claimant acknowledged that from October 16 until this conversation, all communications with Anderson were via text.

Syd Wiens, respondent's president, testified at the preliminary hearing, but his testimony primarily focused on claimant's termination and unemployment claim. He testified concerning the texts on Anderson's cellular telephone and during his testimony, a printed copy of the texts was placed into evidence.

McGrane testified he was claimant's superintendent on the August 2014 Larned job. McGrane indicated the job required a wheelbarrow and was physically demanding.

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[1] P.H. Trans. at 14.

[2] *Id.* at 22.

According to McGrane, during the job, claimant indicated his back was fatigued, but did not say his back was injured. When asked his response to claimant's report of back fatigue, McGrane testified, "I tell everybody, you know, if you need to take a rest, take a rest, but we got a job to get done, so . . . ."[3] If claimant had reported an injury, McGrane would have completed an accident report. McGrane indicated that in the middle of the Larned job, he completed an accident report when claimant lacerated his thumb.

Anderson was claimant's project superintendent in October 2014 on a roofing project. According to Anderson, claimant never reported injuring his back at work. If Anderson had received such a report, he would have completed an accident report.

Anderson verified that all communication between claimant and him from October 17 through 27, 2014, was via texts. During that time period, they never spoke by telephone or in person. Anderson reviewed a printout of texts from his cellular telephone from August 19, 2014, through December 25, 2014, and indicated the texts were between claimant and him. In an October 17 text, claimant indicated he injured his back the previous night. Nothing in the texts made Anderson believe claimant was alleging a work injury. Nor did he recall claimant previously mentioning back pain or back issues.

At the roofing job site, Anderson used a trailer as his office. He acknowledged other people entered the trailer at the job site. Anderson indicated only he used the desk inside the trailer and it was not well organized. He did have in place a procedure to file receipts and documents. Anderson denied receiving an off-work slip from claimant on October 21 or 22.

Anderson confirmed claimant arranged to be off work on vacation on October 23 and 24 and return on October 27. Anderson received a text from claimant on October 27 indicating he would return to work the next day. Anderson then sent a reply text indicating that as far as he was concerned, claimant quit and to come get his tools. On October 29, shortly after 5 p.m., claimant came to respondent's business and Anderson told him where to pick up his tools. Anderson indicated he would have spoken to claimant longer and given him a chance to get his job back if he had come in on October 28 or earlier on October 29. When claimant came to see Anderson on October 29, Anderson was in a hurry to leave in order to go to church.

The first time Anderson learned claimant was claiming a work injury was sometime after October 29, when he was told by Wiens.

The printout of the texts between claimant and Anderson does not mention any back issues between August 19 and October 16, 2014. From October 17 through 27, the following texts were sent:

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[3] McGrane Depo. at 7.

Date	From	Text
10/17	Claimant	Hey Doug [I] did something to my back last night and can[']t [stand] up all the way [I'm] gonna try and get [in to] my dr this morning
10/17	Anderson	Let me know what you find out
10/17	Anderson	What did the doctor have to say?
10/17	Claimant	He said [I've] strained the muscles in my lower back and may have a pinched nerve gave me a steroid and muscle relaxers and a book on stretching my back [before] work somethin[g] called the [McKenzie] technique
10/17	Claimant	Said [I] need to have no lifting and bending for a couple days to see if it starts getting better
10/20	Claimant	[I'm] gonna go back to the dr this morning he said if it hadn[']t gotten better he was gonna do x[-]rays and it[']s not better [I'll] bring a note about everything
10/20	Anderson	Ok
10/20	Anderson	What did the doctor say?
10/20	Claimant	Did an x[-]ray and thinks it[']s a herniated disk [I] just got home now [they're] scheduling an MRI to look deeper and [they're] gonna start giving me corti[s]one injections so [I'm] waiting for the radiology people to call and tell me [when] my MRI is [I'll] be in tomorrow morning with a note
10/22	Claimant	The MRI and first set of injections are today
10/27	Claimant	Comin[g] back to Hutch today [I'll] be in tomorrow

10/27	Anderson	Ryan, as far as I am concerned you already quit. Your tools are still here on sight *[sic]* so you need to come get them.
10/27	Claimant	No, [I] didn[']t quit I told [you] about my back and am getting treated for it and [I] told you [I] [w]as leaving for Cincinnati on Thursday
10/27	Anderson	If you would like to further discuss this we may do so in person or via p *[sic]* phone conversion *[sic]*.
10/27	Claimant	Absolutely in person would be great, I will come see you as soon as possible[4]

Dr. Starkey's September 29, 2014, note indicated claimant reported having back pain for three months that increased. The doctor's September 29 and October 20 notes do not mention a work injury or what claimant believed caused his back symptoms. The doctor provided claimant a release to return to work dated October 20. The release indicates claimant was going to have an epidural injection and an MRI and would return to work after tests were done. An October 27 release to return to work issued by Dr. Starkey indicated claimant had a lumbar disc herniation and claimant could return to work on October 29. On both releases, the section listing restrictions was crossed out.

Claimant again saw Dr. Starkey on December 15. Dr. Starkey diagnosed claimant with lower back pain and a herniated disc. Claimant indicated to the doctor that his employment was terminated because he missed work due to back pain. No mention was made of a work injury or how claimant injured his back.

Claimant's counsel sent a letter dated December 23 to Dr. Starkey asking if claimant's repetitive work activities were the prevailing factor for his back condition and need for medical treatment. The doctor's reply was, " I do not have an opinion as to the cause of Mr. Raigoza's back condition."[5]

Claimant, at his attorney's request, was evaluated by Dr. Pedro A. Murati on January 15, 2015. Dr. Murati indicated claimant presented with a work-related injury while working for respondent. The date of injury was listed in the doctor's report as October 16, 2014. The doctor's impressions were low back pain with signs of radiculopathy and

[4] P.H. Trans., Resp. Ex. C.

[5] *Id.*, Cl. Ex. 2.

bilateral SI joint dysfunction. Dr. Murati opined the prevailing factor for claimant's conditions was his multiple repetitive traumas at work.

Claimant was evaluated at respondent's request by orthopedist Dr. John P. Estivo on February 24, 2015. Claimant reported he started having lumbar spine pain in August 2014 and attributed the pain to repetitive bending and lifting he performed at respondent. Claimant indicated that on October 16, 2014, he carried roofing materials while bending and twisting, began experiencing increasing lumbar spine pain and reported it to his supervisor. After finishing work and going home, he began experiencing increasing lumbar spine pain and reported it to his boss the next day. The remainder of Dr. Estivo's evaluation has no relevance to the issues on appeal.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[7]

K.S.A. 2014 Supp. 44-520(a) states:

> (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.

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[6] K.S.A. 2014 Supp. 44-501b(c).

[7] K.S.A. 2014 Supp. 44-508(h).

> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

The first time claimant alleged his ten days to provide written notice commenced on October 24, 2014, was on appeal to the Board. In his application for hearing and notice of intent, at the preliminary hearing and in his submission letter, claimant alleged his date of injury was October 16, 2014.

K.S.A. 2014 Supp. 44-555c(a), in part, states:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The Board has frequently declined to exercise de novo review when an issue was not raised and limited review to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."[8] This Board Member will not make a de novo review of claimant's date of injury. Claimant's date of injury by repetitive trauma is October 16, 2014.

For the same reasons set forth above, this Board Member will not consider claimant's request for a waiver of the notice requirement because he allegedly did not know his back injury was work related until he was told so by Dr. Murati on January 15, 2015. That argument also fails because as early as October 31, claimant thought he had a work injury as set forth in his application for hearing and notice of intent.

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[8] See K.S.A. 2014 Supp. 44-555c(a); *Byers v. Acme Foundry, Inc.*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013). See also *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

None of the texts sent by claimant to Anderson indicate he sustained a work injury. Claimant's October 17 text stated he injured his back the previous night. Even if the texts sent by claimant to Anderson from October 17 through 26 are considered aggregately, a reasonable person could not ascertain the time, date, place and particulars of claimant's alleged work injury.

Nor do Dr. Starkey's records support claimant's allegation of a work injury. The doctor's records do not state claimant reported a work injury. Dr. Starkey wrote claimant's counsel that he had no opinion as to the cause of claimant's back condition. The releases to return to work issued by Dr. Starkey in October 2014 do not mention a work injury. Therefore, even if claimant placed the October 20 release to return to work on Anderson's desk, Anderson would not know from said document that claimant sustained a work injury.

Claimant told Dr. Estivo he reported his back injury to his boss on October 17. However, Dr. Estivo's report does not indicate how claimant reported his injury or what he reported. Moreover, Dr. Estivo saw claimant several months after he filed his application for hearing.

Claimant alleges that on three occasions prior to October 16, he told Anderson he was having back issues. Anderson denies the same. Claimant also alleges he reported his back hurt to McGrane during the Larned job. McGrane indicated claimant reported his back was fatigued. Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented insufficient evidence to prove he provided timely notice of his injury by repetitive trauma. This Board Member concurs.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[9] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[10]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[9] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[10] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

[11] K.S.A. 2015 Supp. 44-534a.

by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member affirms the May 24, 2016, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of August, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge

[12] K.S.A. 2015 Supp. 44-555c(j).